IN THE SUPREME COURT OF THE STATE OF MONTANA

Number DA 10-0122

T.G.C. and M.C.,

Petitioners and Appellees,

v.

M.C.M.,

Respondent and Appellant

OPENING BRIEF OF THE APPELLANT

On Appeal From
Montana First Judicial District Court, Lewis & Clark County
Before the Honorable Jeffrey M. Sherlock

APPEARANCES:

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues before the Court are:

1. Whether the District Court erred in terminating Appellant's parental rights based on its Conclusion that she was unfit and had abandoned the children;
2. Whether the District Court erred in terminating Appellant's parental rights based on its Conclusion that she had failed to support her children;
3. Whether the District Court erred in granting the Decree of Adoption of M.C.M's children by Appellees.

STATEMENT OF THE CASE

The Appellees filed a combined Petition for Termination of Parental Rights and Petition for Adoption on March 6, 2009 in the First Judicial District Court of Lewis and Clark County, Montana. The Petition was brought before the District Court for hearing on December 23, 2009. The District Court issued its order granting the Petition to Terminate Parental Rights on January 5, 2010 and Decree of Adoption on February 2, 2010. From the Order granting the Petition to Terminate Parental Rights and Decree of Adoption, the Appellant appeals.

STATEMENT OF THE FACTS

M.C. resides in Boulder, Montana. (Tr. p.1, line 25). She has been married to T.G.C. for 10 years. M.C. is the paternal grandmother of the children, M.M.M. and D.M. T.C. is M.C.M.'s second husband and is not the paternal grandfather of the children. (Tr. p.2, ll. 8-22). The minor child, M.M.M. is 10 years old and D.M. is 8 years old. (Tr. p.2, line 25).

In July of 2007, M.M. and the child's biological father, R.M. who is M.C.'s son, were divorced and M.M. and R.M. came before Honorable Sherlock for a dissolution of their marriage. At that time, the Court asked M.M. what she thought was the best idea for the children and M.M. stated that she felt the children should continue to live with M.C. until such time as M.M. could straighten out her legal and social circumstances. (See. Tr. p. 29, ll. 2-10) M.C. was awarded guardianship over the child. (See Tr. p. 11, ll. 18-23).

The children resided with M.C. for part of 2002 when M.C.M. asked her to take the children. (Tr. p.3, ll. 9-10; p.3, line 23.)

In 2003 and 2004, M.C. had the children for most of the year except for about one month each year when they resided with M.C.M. (Tr. p. 4, ll. 7-10, p. 4, ll. 11-14).

In 2005, the children resided part of the year with M.C. when M.C. M. went to the hospital in Missoula for mental health treatment and to a women's abuse center in Great Falls. (See Tr. P. 5, ll. 15-18; p. 6, ll. 4-6). During 2005, M.C.M. also took the children to South Carolina so they could meet her biological father for a month or two. (See Tr. p. 6, ll. 13-23).

In 2006, M.C.M. asked M.C. to take care of the children again. (See Tr. p.7, line 25). The children lived on and off with M.C.M. and M.C. (See Tr. p. 8 ll. 1-3).

During 2006, M.C.M. and the children moved to Victor, Montana. Toward the end of May, 2006, M.C.M. called M.C. to come and get the children. (See Tr. p. 8, ll. 13-18; p. 9, line 23). The children resided with M.C. throughout the rest of 2006. (See Tr. p. 10, ll. 1-2).

In February, 2007, the children went to reside again with M.C.M. until April 3, 2007. (See Tr. p. 10, ll. 8-13, ll. 19-25, p. 11 ll. 1-3). M.C. M. then called M.C. and asked her to come and pick up the children because she didn't want them to go through the trauma and the alcohol and drug environment she was in. (See Tr. p. 28 ll. 12-25).

M.C. has always allowed M.C.M. visitation with the children whenever she could manage it. (See Tr. p. 12, ll. 3-10).

On July 21, 2007, M.C.M. called M.C. and told her that she had been using drugs again and charges were going to be filed. (See Tr. p. 12, ll. 13-15). She was charged with possession of methadone. (See Tr. p. 30, ll. 18-25). M.C.M.'s probation was revoked on September 17, 2007 for a voluntary UA, for violating a stop sign violation and for not paying her fines in a timely manner. (See Tr. p. 12, ll. 16-19; p. 31, ll. 1-5). M.C.M.'s probation officer believed that M.C.M. needed treatment and therefore, revoked her sentence. (Tr. p. 29, ll. 11-17) M.C.M. was incarcerated for three years from November, 2007 until October, 2009 when she was released on conditional release to the Butte Department of Probation and Parole.

During that same time frame, M.C.M. also spent time at Elkhorn Treatment Center in Boulder. (See Tr. p. 29, l. 23-25). She took a parenting course, CPR 1, 2 and 3, and an SSIC class. M.C.M. also became a mentor wherein she helped teach those classes and helped teach DBT to some of the other residents at Elkhorn. (See Tr. p. 30, ll. 1-4)

After October, 2009, the children had been spending weekends with M.C.M. (See Tr. p. 13, ll. 24-25). M.C.M. has been employed at the Freeway Tavern as a cook since June 2009. (See Tr. p. 14, l. 7; p. 30, ll. 6-7, 9-10). She lives with her boyfriend, John Wambolt in a really nice place in Butte. (See Tr. p. 14, ll. 17-22, p.26, ll. 21-25, p. 27, line 3).

At the termination hearing, M.C. wanted permanent custody of the children, or if not, then she thought some guidelines should be put on M.C.M. such as needing a job and a home of her own for six months or a year before taking possession of the kids. (See Tr. p. 15, ll. 6-14).

M.C. felt that it was in the children's best interest to stay with her. (See Tr. p. 15, ll. 24-25, p. 16, ll. 1-2). The children got fairly good grades for mid-quarter. (See Tr. p. 16, ll. 6-25, p. 17, ll. 1-13). M.C. did not believe the children would have a stable life with their mother. (See Tr. p. 17, ll. 24-25, p. 18, line 1).

T.G.C. testified that he loved the children and wanted to adopt them. (See Tr. p. 24, ll. 21-25, p. 25, ll. 1-4).

In September, 2009, M.C.M. indicated that she wanted her children back after she had finished her parole. (See Tr. p. 18, ll. 6-11). M.C. testified that M.C.M. never provided any support to her during the time she had the children and the divorce decree ordered that she pay support. (See Tr. p. 18. ll. 22-24, p. 22, ll. 14-19).

The birth father R.M., who is M.C.'s son, consented to termination of his rights and adoption. (See Tr. p. 23, line 23).

M.C.M. has made mistakes in the past because she didn't have the tools she needed. She had been in a very abusive relationship with the children's father, R.M., who is M.C.'s son that was very difficult for her to come out of. (See Tr. p.

31, ll. 7-14). She believes that the treatment she received at Elkhorn and the courses she took have given her the tools she needed to turn her life around. She has been clean and sober since November 2, 2007. (See Tr. p. 31, ll. 14-17).

M.C.M. cares very much about her children and believes she has made right choices for them, even when she couldn't make those choices for herself, such as allowing M.C. to have guardianship over the children. (See Tr. p. 31, ll. 22-25, p. 32, line 1). M.C. always told M.C.M. she would never take her children away from her. (See Tr. p. 32, ll. 2-3).

M.C.M. received the termination and adoption petition while she was still in the Butte Pre-Release Center. She was not planning on revoking the guardianship until she got out of pre-release and had a residence and a job and felt like she was more stable. It didn't make sense to her to try and revoke guardianship when she didn't have a place or a foundation for her children or herself. (See Tr. p. 32, ll. 4-12).

M.C.M. introduced letters of recommendation into evidence regarding her character and parenting. (Tr. p. 32, ll. 12-21). She believes that the best thing for her children is to be with her, their natural parent. (See Tr. p 32, ll. 22-25). M.C.M. requested M.C. bring the children to the courthouse in case the Judge wanted to speak to them so that they could express their wishes. (See Tr. p. 33, ll. 2-5).

M.C.M. did not willfully abandon her children. She was incarcerated from 2007 until October 2009. She had no control over visitation of the children. She did keep in contact through letters and phone calls. (See Tr. p. 33, ll. 3-9). M.C.M. did not believe she met the criteria set forth in the Code to be found an unfit parent. She recognized that the law states that she should contribute if able, but being incarcerated, she was not really making any money and couldn't be sending anything out. She had no means to support the children during that time. (See Tr. p. 34, ll. 10-19). Since her release, she has purchased items for her children. When they are with her, she fully takes care of them. They have everything they need at her home. (See Tr. p. 34, ll. 20-23).

STANDARD OF REVIEW

This Court reviews a district court's findings of fact to determine if they are clearly erroneous. Findings are clearly erroneous if they are not supported by substantial evidence, if the District Court misapprehended the evidence or a review gives this Court a definite and firm conviction that the District Court made a mistake. *In re the Adoption of K.P.M., S.J.D. and B.J.M.*, 2009 M 31, ¶10, 349 Mont. 170, 201 P.3d 833, citing *Interstate Production Credit v. De Saye*, 250 Mont. 320, 323, 820 P. 2d 1285, 1287 (1991).

This Court reviews a District Court's conclusions of law to determine whether the conclusions are correct. *In re Adoption of C.R.N.* 1999 MT 92, ¶7, 294 Mont. 202, 979 P.2d 210.

SUMMARY OF ARGUMENT

The District Court found that the children lived with their paternal grandmother for most of their lives and after the District Court entered its divorce decree in July, 2007, that M.C.M. never manifested any indication that she would retake custody of the children. The Court found that M.C.M. did not, within one year of the date of the divorce decree, petition the Court to hold a hearing on whether she should resume custody of the children and therefore, it was reasonable for M.C. and T.G.C. to believe M.C.M. did not intend to resume care for her children. The District Court erroneously concluded M.C.M. demonstrated a lack of action and therefore, that she had "willfully" abandoned her children.

The District Court also incorrectly concluded that M.C.M., was able, yet had not contributed to the support of the children for an aggregate period of one year before the filing of the petition for adoption and therefore, she was unfit.

The District Court further incorrectly concluded that M.C.M. was in violation of the decree of dissolution, finding that she had paid nothing to support the children and therefore, her rights should be terminated.

The District Court ultimately incorrectly concluded by a preponderance of the evidence that termination of M.C.M.'s parental rights and adoption by M.C. and T.G.C. was in the best interest of the children.

ARGUMENT

1. THE DISTRICT COURT ERRED IN TERMINATING APPELLANT'S PARENTAL RIGHTS BASED ON ITS CONCLUSION THAT SHE WAS UNFIT AND HAD ABANDONED THE CHILDREN.

Section 42-2-608(1)(b), Montana Code Annotated (hereinafter M.C.A.) provides the authority for termination of parental rights for purposes of making a child available for adoption on the grounds of unfitness if:

> the parent has willfully abandoned the child, as defined in 41-3-102, M.C.A, in Montana or in any other jurisdiction in the United States.

Section 41-3-102(1)(a), M.C.A. defines abandoned as:

(i) Leaving the child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future; or

(ii) Willfully surrendering legal custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent arrangements for the care of the child.

The facts in this case at bar are similar to those in *Matter of Adoption of Doe*, 277 Mont. 251 921 P.2d 875 (1996). In this case as in *Adoption of Doe*, M.C.M. was incarcerated for two years prior to the filing of M.C and T.G.C.'s petition for termination of parental rights and adoption. It is unquestionable that M.C.M. left the children with M.C. (not T.G.C.) shortly before she went was incarcerated. M.C.M. agreed to M.C.'s temporary guardianship over the children while she got her life together. M.C. always stated she would not "take" the children from M.C.M. She also testified that if M.C.M. got the children back, she would like to see certain guidelines imposed. M.C.M. continually maintained contact with the children while she was incarcerated. Clearly, M.C. was aware that M.C.M. in no way desired to terminate her relationship with the children or abandon them. M.C.M. manifested a firm intention to resume physical custody. The circumstances of this case do not support a reasonable belief that M.C.M. did not intend to resume caring for the children in the future.

The District Court erroneously found that M.C. cared for the children most of their lives. The testimony established that children lived on and off with M.C. and their mother until M.C.M. voluntarily granted temporary guardianship of the children to M.C. in July 2007. (See Tr. and Divorce Decree in Appendix.) The Court further erroneously found that M.C.M.

failed to manifest any intention that she would retake custody of the children, that specifically she did not petition the Court within one year of the decree of divorce, to resume custody of the children.

The record demonstrates that within four months after the decree of divorce, M.C.M. was incarcerated. Logically, she could not have petitioned the Court to resume custody of the children while she was incarcerated. M.C. and T.G.C. knew she was incarcerated. During her incarceration, M.C.M. corresponded with the children through letters and phone calls. She attended and passed parenting classes while at Elkhorn. Even M.C., in her testimony, stated that she thought if M.C.M. got the children back, she should have to have a job, a home and establish herself.

M.C.M. received the adoption petition while she was still in the Butte Pre-Release Center. She was not planning on revoking the guardianship until she got out of pre-release and had a residence and a job and felt like she was more stable. It didn't make sense to her to try and revoke guardianship when she didn't have a place or a foundation for her children or herself. (See Tr. p. 32, ll. 4-12). M.C.M. never assented to anything more than M.C. having guardianship over the children.

This Court has held in *Adoption of Doe* at 257-258, that a separation from a child for an extended period of time due to incarceration, whether the separation was voluntary or involuntary did not rise to the level of abandonment.

Doe was distinguished by *Matter of Adoption of K.P.M.*, 349 Mont. 170, 201 P.3d 833 (2009) in that in *Doe*, the natural parent who was incarcerated maintained contact monthly and refused to grant permanent custody to the grandparent; whereas in *K.P.M.*, the adopting party did not hear from the incarcerated parent for fifteen months.

There is no evidence in the record reflecting any action or inaction on M.C.M.'s part that establishes abandonment. On the contrary, she attempted to stay in contact with the children from jail and has continued to see the children on weekends after she was released. While she unquestionably had been separated from them for an extended period due to her incarceration and has also left them in their paternal grandmother's care for extended periods of time before that, just as in *Doe* at 258, such separations, voluntary or involuntary, do no rise to the level of abandonment. The District Court erred by finding M.C.M. abandoned the children.

2. THE DISTRICT COURT ERRED IN TERMINATING APPELLANT'S PARENTAL RIGHTS BASED ON ITS CONCLUSION THAT SHE HAD FAILED TO SUPPORT HER CHILDREN

Section 42-2-608(1)(c), M.C.A. provides the authority for termination of parental rights for purposes of making a child available for adoption on the grounds of unfitness if:

> It is proven to the satisfaction of the court that the parent, if able, has not contributed to the support of the child for an aggregate period of 1 year before the filing of a petition for adoption.

The District Court simply concluded that M.C.M. did not contribute to the support of the children for the aggregate one year prior to the filing of the Petition for adoption; however, in addition to determining whether in fact M.C.M. contributed to the support of the children, the District Court must also determine if M.C.M. had the ability to contribute to the support of the children during that year. *Doe* at 258 citing *In re the Adoption of J.B.T.* (1991), 250 Mont. 205, 209, 819 P.2d 178, 179. In determining whether a parent was able to contribute support, a District Court must examine several factors, including:

(1) The parent's ability to earn an income;

(2) The parent's willingness to earn an income and support his or her child or children;

(3) The availability of jobs; and

(4) The parent's use of his or her funds to obtain only the bare necessities of life prior to contributing support to the child or children. *Doe* at 259.

In the case at bar, the District Court only partially applied these factors. The District Court recognized that M.C.M. had been incarcerated

for much of the time, however the Court found that M.C.M. had a variety of jobs as part of her supervision through DOC, yet she did not contribute to the children. What the Court failed to apply was the fourth factor being, whether M.C.M.'s use of her funds was for the bare necessities of life prior to contributing to the children.

The District Court also went back to 2002 and erroneously found that M.C.M. provided no contribution to the children. This is erroneous for multiple reasons being: the children resided on and off with M.C.M. during most of the years between 2002 and 2007; anything earlier than 2008, is outside the scope of one year prior to the date of the Petition and therefore is beyond the scope of the District Court's inquiry. *Doe* at 260.

Section 42-2-608(1)(d), M.C.A. provides the authority for termination of parental rights for purposes of making a child available for adoption on the grounds of unfitness if:

> it is proven to the satisfaction of the court that the parent is in violation of a court order to support either the child that is the subject of the adoption proceedings or other children with the same birth mother.

The District Court found that M.C.M. was in violation of the divorce decree that directed her to provide support for the children as she was able. This finding is likewise erroneous.

Shortly after the divorce decree, M.C.M. was incarcerated. She was served with the Termination and Adoption Petition while at Butte Pre-Release (still incarcerated). The divorce decree stated that she should provide support for the children **as she was able** (emphasis added). While incarcerated, she was unable. M.C.M. testified that since she has been released, she does provide support for the children when they are with her. Had this proceeding not been initiated, the children would be residing with her and she would be exclusively supporting the children.

3. THE DISTRICT COURT ERRED IN GRANTING THE DECREE OF ADOPTION OF THE MINOR CHILDREN, M.M.M. and D.M. BY APPELLEES.

In order for T.G.C. and M.C. to adopt the children, the District Court must have first determined that termination of M.C.M.'s rights was in the best interest of the children. 42-2-617, MCA. In order to determine whether termination was in the best interest of the children, the District Court must have correctly applied 42-2-608, M.C.A.

M.C. and T.G.C. must also have completed a preplacement evaluation to determine fitness and readiness as an adoptive parent in accordance with 42-3-201, M.C.A.; 42-3-202, M.C.A.; 42-3-203, M.C.A. 42-3-204, M.C.A. 42-3-205, M.C.A.

According to 42-3-213, M.C.A., the preplacement report must be filed with the court in support of the petition to terminate parental rights. The District Court may waive the requirements of the preplacement and postplacement evaluation when a parent or guardian laces a child for adoption directly with an extended family member of the child. 42-3-212, M.C.A. In this case, the District Court waived the evaluations in its Decree of Adoption.

The District Court erred in doing so however. M.C.M. had voluntarily placed the children with M.C. not T.G.C. T.G.C. is not related to the children. He is M.C.'s husband.

Additionally, M.C.M. filed a Notice of her revocation of the guardianship after this proceeding was instituted. M.C.M. was not voluntarily placing the children for adoption with M.C. and T.G.C. as 42-3-212, M.C.A. contemplates and therefore, the evaluations should have been required.

Additionally, the District Court determined that termination of M.C.M.'s parental rights and adoption by M.C. and T.G.C. was in the children's best interests; however such determination requires that the Court determine by a preponderance of the evidence that termination and adoption was in the children's best interests.

The only evidence before the Court was the children's mid-quarter grades and self-serving testimony of M.C and T.G.C. In fact, there was evidence to the contrary introduced by M.C.M. supporting her abilities as a parent and recommending that the children reside with her. At no time was evidence introduced to indicate that a guardian ad litem had ever been appointed for the children at any time pursuant to 40-4-205, M.C.A. or as would have been done pursuant to 41-3-112, M.C.A. including at the time of divorce of M.C.M. and R.M. A guardian ad litem should have been there to represent the interests of the children, not M.C. and T.G.C. or M.C.M. M.C.M. was unrepresented by legal counsel.

CONCLUSION

M.C. and T.G.C. have failed to provide clear and convincing evidence that the statutory requirements for termination have been met. A parent's right to the care and custody of a child is a fundamental liberty interest and must be protected by the Court.

M.C.M.'s addiction to drugs and alcohol has been successfully overcome. M.C.M. has been provided with the tools for overcoming abusive relationships, drugs and alcohol, factors which lead to M.C. helping with the children. M.C.M. has been sober since November, 2007.

M.C.M.'s non-payment of child support during the year prior to the filing of this Petition was primarily due to her incarceration and the limited the amount of work she could obtain. She was not unwilling to support her children during that time; simply unable.

When M.C.M. learned an action was planned to terminate her rights, she sought legal assistance immediately, but was unsuccessful in obtaining an attorney. She was forced to represent herself in trial. She has had numerous problems over the past years, which she has worked diligently and successfully to overcome. The District Court erred in its conclusions and its judgment should be overturned and M.C.M.'s children should be returned to her.

DATED this 21st day of May, 2010.

JD LAW FIRM, P.C.

By: _____
Lori A. Harshbarger

Attorney for Appellant

CERTIFICATE OF SERVICE

I, LORI A. HARSHBARGER, hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States Mail postage prepaid, addressed to each at the last known address as shown on this page on the 21st day of May, 2010.

Charles Smith
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JD LAW FIRM, P.C.

BY: _____
LORI A. HARSHBARGER

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word 2007 is not more than 10,000 words (5,000 for reply), not averaging more than 280 words per page, and is not more than 30 (14 for reply) pages, excluding Certificate of Service and Certificate of Compliance.

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